UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

---x

JEFFREY PROVENZANO, THOMAS BENJAMIN and MONICA AGOSTO, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

THE THOMSON CORPORATION and WEST PUBLISHING CORPORATION d/b/a BARBRI,

Defendants.

---x

Civil Action No.
1:07-CV-0746, LEK/RFT

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

SATTERLEE STEPHENS BURKE & BURKE LLP

James F. Rittinger (Bar Roll No. 507281)
Attorneys for Defendants The Thomson Corporation and West Publishing Corporation
230 Park Avenue, Suite 1130
New York, NY 10169
(212) 818-9200

708488_2

Dockets.Justia.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. TWOMBLY, AS INTERPRETED BY THE SECOND CIRCUIT, IS APPLICABLE AND REQUIRES PLAINTIFFS TO MEET A PLAUSIBILITY STANDARD 2

II. PLAINTIFFS HAVE IDENTIFIED NO DECEPTIVE ACTS SUPPORTING LIABILITY UNDER GBL § 349 4

III. PLAINTIFFS HAVE NOT PLED THAT THEY WERE MISLED, OR THAT THEIR INJURIES WERE CAUSED BY THE ALLEGED DECEPTION 7

IV. PLAINTIFFS' FRAUDULENT INDUCEMENT CLAIM ALSO FAILS 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

ATSI Comm'c'ns, Inc. v. Shaar Fund, Ltd.,
493 F.3d 87 (2d Cir. 2007) 2

In re Am. Express Co. S'holder Litig.,
39 F.3d 395 (2d Cir. 1994) 10

Andre Strishak & Assocs. v. Hewlett Packard Co.,
300 A.D.2d 608, 752 N.Y.S.2d 400 (2d Dep't 2002) 3

Bavaria Int'l Aircraft Leasing GmbH v. Clayton, Dubilier & Rice, Inc.,
No. 03 Civ. 0377, 2003 WL 21767739 (S.D.N.Y. July 30, 2003) 10

Bell Atlantic Corp. v. Twombly,
127 S. Ct. 1955 (2007) 2, 3, 4

Bildstein v. Mastercard Int'l, Inc.,
No. 03 Civ. 9826, 2005 WL 1324972 (S.D.N.Y. June 6, 2005) 9

Bose Corp. v. Linear Design Labs, Inc.,
467 F.2d 304 (2d Cir. 1972) 7

Conboy v. AT&T Corp.,
241 F.3d 242 (2d Cir. 2001) 3, 8

Conley v. Gibson,
355 U.S. 41, 78 S. Ct. 99 (1957) 2

EEOC v. Concentra Health Servs., Inc.,
496 F.3d 773 (7th Cir. 2007) 2

Gale v. Int'l Bus. Machs. Corp.,
9 A.D.3d 446, 781 N.Y.S.2d 45 (2d Dep't 2004) 8, 9

Goldych v. Eli Lilly & Co.,
No. 5:04-CV-1477, 2006 WL 2038436 (N.D.N.Y. July 19, 2006) 9

Iqbal v. Hasty,
490 F.3d 143 (2d Cir. 2007) 2

Lacoff v. Buena Vista Publ'g, Inc.,
183 Misc. 2d 600, 705 N.Y.S.2d 183 (Sup. Ct. N.Y. Cty. 2000) 7

Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank,
85 N.Y.2d 20, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995)....................3

Phillips v. Am. Int'l Group, Inc.,
498 F. Supp. 2d 690 (S.D.N.Y. 2007) 3

S.Q.K.F.C., Inc. v. Bell Atl. Tricon Leasing Corp.,
84 F.3d 629 (2d Cir. 1996) 3

Shapiro v. Berkshire Life Ins. Co.,
212 F.3d 121 (2d Cir. 2000) 3

Solomon v. Bell Atl. Corp.,
9 A.D.3d 49, 777 N.Y.S.2d 50 (1st Dep't 2004)....................8

Spagnola v. Chubb Corp.,
No. 06 Civ. 9960, 2007 WL 927198 (S.D.N.Y. Mar. 27, 2007)....................3

TimeWarner Cable, Inc. v. DirecTV, Inc.,
497 F.3d 144 (2d Cir. 2007) 6

Weisbarth v. Geauga Park Dist.,
2007 WL 2403659 (6th Cir. Aug. 24, 2007) 2

@Wireless Enters., Inc. v. AI Consulting, LLC,
No. 05-CV-6176, 2006 WL 3370696 (W.D.N.Y. Oct. 30, 2006) 8

In re WorldCom, Inc. Secs. Litig.,
No. 02 Civ. 3288, 2006 WL 557149 (S.D.N.Y. Mar. 7, 2006) 10

STATUTES AND RULES

Fed. R. Civ. P. 9(b) 9, 10

Fed. R. Civ. P. 11....................4

Fed. R. Civ. P. 12(b)(6) 1

N.Y. General Business Law § 349....................*passim*

MISCELLANEOUS

Restatement (Second) of Torts § 548A (1977)....................9

Defendants The Thomson Corporation ("Thomson") and West Publishing Corporation ("West") (collectively "Defendants" or "BAR/BRI"), by their attorneys, Satterlee Stephens Burke & Burke LLP, respectfully submit this reply memorandum of law in further support of their motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the amended complaint.

PRELIMINARY STATEMENT

In their opening brief ("Defs.' Br."), defendants painstakingly examined each statement or other act by BAR/BRI claimed by plaintiffs to be actionable under General Business Law ("GBL") § 349. That analysis demonstrated that, in addition to the amended complaint's numerous other infirmities, none of the statements described by plaintiffs could remotely be deemed objectively misleading to the reasonable consumer. The complaint's attempts to claim otherwise were based on the most tortured readings of BAR/BRI's words, strawman arguments and, in some cases, outright nonsequiturs. The defendants showed conclusively that it is utterly implausible that any reasonable consumer – particularly law school graduates (or near-graduates) – could possibly have been misled by BAR/BRI's advertising statements.

Plaintiffs' response to this point-by-point examination is, largely, no response at all. Plaintiffs' opposition papers ("Opp. Br.") offer no defense of the claims of misleading statements made in the complaint, nor does the opposition offer up any additional arguments as to how the statements made by BAR/BRI might have misled the reasonable consumer. Such a failure to respond – a tacit admission, really, of the patent indefensibility of their claims – by itself warrants granting of defendants' motion. Plaintiffs likewise do nothing to rectify the other significant deficits in their complaint, among these the fact that they have neither pled that they were actually misled by any purported misrepresentations by defendants, nor pled any plausible theory under which such misrepresentations, if any, actually caused their supposed injury.

In short, plaintiffs' opposition papers serve only to confirm a conclusion apparent from the complaint itself – that plaintiffs have no viable claim under either General Business

Law § 349 or for common-law fraud. Plaintiffs' pleading deficiencies are patent under any standard, but especially so now that the Supreme Court and the Second Circuit have made it clear that plaintiffs must cross a plausibility threshold before they will be allowed to impose upon defendants the time and expense of discovery in the vain hope of unearthing a viable claim. Plaintiffs fall far short of the mark. The complaint should, therefore, be dismissed in its entirety.

ARGUMENT

I. TWOMBLY, AS INTERPRETED BY THE SECOND CIRCUIT, IS APPLICABLE AND REQUIRES PLAINTIFFS TO MEET A PLAUSIBILITY STANDARD

Plaintiffs spill a great deal of ink apparently attempting to convince the Court that the Supreme Court's decision in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) does not mean what it says. For example, plaintiffs suggest that decisions from the Sixth and Seventh Circuits cast doubt on Twombly's scope (Opp. Br. at 12) – which, even if plaintiffs' readings were accurate (which they are not)[1], would be wholly beside the point, given the Second Circuit's express holdings that Twombly states a general pleading standard of plausibility and non-speculativeness that is not limited to antitrust claims. See ATSI Comm'c'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 & n.2 (2d Cir. 2007); Iqbal v. Hasty, 490 F.3d 143, 157-8 (2d Cir. 2007). Plaintiffs even go so far as to repeatedly invoke the "no set of facts" standard of Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957) that Twombly clearly and expressly disapproved. See Opp. Br. at 2-3, 5; Twombly, 127 S. Ct. at 1968-69 (Conley's "no set of facts" language "has earned its retirement" and is "best forgotten").

To a great extent, however, arguments over the meaning of Twombly (even if plaintiffs had presented any cogent ones) are unnecessary for purposes of this motion, for

[1] Neither of the cases cited casts doubt upon the Second Circuit's application of Twombly. In Weisbarth v. Geauga Park Dist., 2007 WL 2403659 (6th Cir. Aug. 24, 2007), the Sixth Circuit cited approvingly to Iqbal but decided that determining the scope of Twombly was unnecessary for its holding. Id. at *3. In EEOC v. Concentra Health Servs., Inc., 496 F.3d 773 (7th Cir. 2007), the Seventh Circuit likewise did not deem it necessary to determine the scope of Twombly, since the plaintiff's complaint was inadequate even under pre-Twombly precedents. Id. at 782 n.4.

plaintiffs' complaint is fatally deficient under any pleading standard. Because GBL § 349 sets an objective standard for whether a defendant's alleged conduct is misleading – i.e., was "likely to mislead a reasonable consumer acting reasonably under the circumstances," Shapiro v. Berkshire Life Ins. Co., 212 F.3d 121, 126 (2d Cir. 2000) (quoting Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 26, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995)) – and because, therefore, this becomes an issue determinable as a matter of law, see Oswego, 85 N.Y.2d at 20, there are numerous examples of pre-Twombly federal courts (and New York state courts, for whom Twombly is inapplicable) dismissing § 349 claims on the pleadings because the alleged conduct was simply not actionably deceptive as a matter of law. See, e.g., Conboy v. AT&T Corp., 241 F.3d 242, 258 (2d Cir. 2001); S.Q.K.F.C., Inc. v. Bell Atl. Tricon Leasing Corp., 84 F.3d 629, 636-37 (2d Cir. 1996); Andre Strishak & Assocs. v. Hewlett Packard Co., 300 A.D.2d 608, 609-10, 752 N.Y.S.2d 400 (2d Dep't 2002); Spagnola v. Chubb Corp., No. 06 Civ. 9960, 2007 WL 927198, at *5 (S.D.N.Y. Mar. 27, 2007); see also Phillips v. Am. Int'l Group, Inc., 498 F. Supp. 2d 690, 699 (S.D.N.Y. 2007) (issued post-Twombly but with no discussion of its effect on pleading standards). As discussed infra at 4-7, plaintiffs' complaint relies upon allegations of conduct that are similarly legally deficient. Dismissal of such a complaint was compelled before Twombly; it is of course only more so now.

What Twombly does, importantly, is recognize that allowing a complaint to move forward into discovery is not without costs; some pleading going beyond "mere possibility" must be required, "lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of people, with the right to do so representing an in terrorem increment of the settlement value." 127 S. Ct. at 1966 (quotations omitted). Recognizing that discovery management and summary judgment procedures had proven inadequate to the task of preventing such inequities, id. at 1967, the Court in Twombly held that the court reviewing such a pleading must take a more active role than simply determining that it is not impossible or inconceivable that the plaintiff might eventually prove facts stating a claim, id. at 1968.[2] Rather, the complaint must contain enough facts to convince the court that the claim has been "nudged . . . across the line from conceivable to plausible." Id. at 1974.

It is that line that plaintiffs fail even to approach, much less cross.[3] Their complaint is awash in "labels and conclusions" and cannot muster even the "formulaic recitation of the elements of a cause of action" that the Court in Twombly found inadequate. Id. at 1965. It is readily apparent that plaintiffs have no "reasonably founded hope" of proving that the BAR/BRI statements included in the complaint form a basis for relief. Id. at 1969. Accordingly, Twombly requires that "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." Id. at 1966 (quotations omitted).[4]

II. PLAINTIFFS HAVE IDENTIFIED NO DECEPTIVE ACTS SUPPORTING LIABILITY UNDER GBL § 349

In their opening memorandum, defendants took each allegedly misleading statement by BAR/BRI and demonstrated how the complaint's description of them as deceptive was based on wholly unreasonable readings and, in some cases, absurd nonsequiturs. The BAR/BRI advertising statements challenged by plaintiffs simply could not be deemed misleading in any material way to consumers of bar review products, particularly given that such consumers are persons who have finished or nearly finished a challenging law school education.[5]

---

[2] Plaintiffs argue that "concerns for frivolous lawsuits are best addressed by Fed. R. Civ. P. 11." (Opp. Br. at 9.) The suggestion that nothing less than a sanctionable complaint is suitable for 12(b)(6) dismissal flies in the face, not only of Twombly, but of decades of federal jurisprudence. Defendants take no issue, however, with plaintiffs' counsel's recognition of the salutary role of Rule 11 in policing "improper" filings – with which counsel has recently become intimately familiar. See Thomasson v. GC Servs. Ltd. P'ship, No. 05cv0940-LAB(CAB) (S.D. Cal.), Docket No. 213 (Order Imposing Rule 11 Sanctions, dated Sept. 5, 2007) (available on PACER).

[3] Defendants have, of course, nowhere "impli[ed] that Plaintiffs in a federal action now must prove their case via their complaint rather than plead their case." (Opp. Br. at 8.) "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of" a valid claim. Twombly, 127 S. Ct. at 1965.

[4] Plaintiffs' suggestion that they should first be allowed discovery to determine if they actually have a claim (Opp. Br. at 22) is clearly at odds with the approach commanded by Twombly. Plaintiffs must first demonstrate that they have a plausible claim for relief before they are entitled to impose the time and expense of discovery on defendants.

In their opposition papers, plaintiffs almost completely ignore this analysis and offer up no explanation of how the predicate statements meet the standard for deceptiveness. Plaintiffs nowhere in their papers choose to defend, for example, any of the following claims:

- Plaintiffs' assertion that law students would be materially misled by BAR/BRI's statement that "the bar exam is different from law school" because, in fact, it is not different (Compl. ¶ 28; see Defs.' Br. at 10-11);

- The claim that law school graduates, by virtue of their experience, would necessarily find it not difficult to schedule study time for the bar on their own and that, therefore, BAR/BRI's claim that it is "nearly impossible" to accumulate the necessary materials is not only false but that law graduates are incapable of assessing this claim for themselves and would thus be misled (Compl. ¶ 29; see Defs.' Br. at 11-12);

- Plaintiff's claim that the fact that the bar topics are taught in some fashion at most law schools renders BAR/BRI's suggestion that most law students could not take all of those topics misleading (Compl. ¶ 30; see Defs.' Br. at 12-13); or

- The baffling suggestion that BAR/BRI has misleadingly touted its faculty's qualifications because New York law school professors "must know" the bar topics and impart them to their students (Compl. ¶ 32; see Defs.' Br. at 14).

Other claims by plaintiffs go similarly unaddressed. Plaintiffs' utter silence in the face of defendant's arguments is a tacit admission that these claims are, in fact, indefensible.

The one counterargument plaintiffs do attempt, moreover, is without merit. Defendants demonstrated that many (though Defendants never claimed all) of plaintiff's challenged statements were plainly nonactionable "puffing" – "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion" or "an exaggerated, blustering and boasting statement upon which no reasonable buyer would be justified in relying," TimeWarner Cable, Inc. v. DirecTV, Inc., 497

[5] Plaintiffs agree that the proper perspective to judge the allegedly misleading nature of the advertising is from that of the "reasonable graduate of a New York law school." (Opp. Br. at. 7; see also Compl. ¶ 39.)

F.3d 144, 159-60 (2d Cir. 2007). Plaintiffs' response to this analysis is, first, to make the surprising claim that the complaint "is not a challenge to subjective claims *about* BAR/BRI products." (Opp. Br. at 15.) This statement is absurd on its face: the complaint and opposition papers makes clear plaintiffs' basic assertion that BAR/BRI's advertising conveys the message that taking BAR/BRI is essential to passing the bar. (Compl. ¶¶ 25; Opp. Br. at 6, 7, 15.) If that is not a claim about the BAR/BRI product, it is difficult to imagine what is.[6]

Plaintiffs further state that "the statements at issue can be proven either true or false" (Opp. Br. at 15) – without attempting to differentiate between those statements that defendants have argued are puffing, and those that defendants have not. Undoubtedly, some of the challenged statements are provable true or false.[7] Just as undoubtedly, however, other statements are plainly subjective claims – e.g., that BAR/BRI "gives you the best chance of passing your bar exam the first time" (Compl. ¶ 33) – that are not actionable under § 349. With respect to these statements, plaintiffs have offered no argument (or authority) to the contrary.

Most importantly, plaintiffs' central premise is that the aggregate effect of the BAR/BRI advertising is to state that "a bar candidate cannot pass the New York State bar examination unless he or she purchases a BAR/BRI New York bar review product." (Compl. ¶ 25.) BAR/BRI has never actually said such a thing, and plaintiffs nowhere claim otherwise. But even assuming that this message could be fairly read into BAR/BRI's advertising (a most dubious assumption), it is apparent that no reasonable person would understand this literally – i.e., that failure to take BAR/BRI is certain to result in failure of the bar exam. The most any reasonable person would understand BAR/BRI to be claiming is that it is highly valuable to take its product, or that one would have a better chance of passage by taking BAR/BRI. And that is precisely the sort of "puffing" about one's product that cannot form the basis for a § 349 claim. See, e.g., Lacoff v. Buena Vista Publ'g, Inc., 183 Misc. 2d 600, 610, 705 N.Y.S.2d 183 (Sup. Ct. N.Y. Cty. 2000); Bose Corp. v. Linear Design Labs, Inc., 467 F.2d 304, 310-11 (2d Cir. 1972).

---

[6] Plaintiffs also offer no authority for their implication that "puffing" is only limited to claims directly about the product itself.

[7] For example, the statement by BAR/BRI that it "has a national and regional faculty of bar exam specialists," many of whom "have been teaching for BAR/BRI for more than 30 years" (Compl. ¶ 32) is certainly provable true or false. Plaintiffs never, however, allege that these statements are actually false, but rather allege only that (non-BAR/BRI) New York law school professors are also capable instructors – something BAR/BRI's statement could not possibly be read to dispute.

In short, plaintiffs offer no cogent response to the showing made by defendants that none of the BAR/BRI advertising cited in the complaint – separately or in the aggregate – could plausibly be considered misleading to the reasonable consumer, acting reasonably, and that this is particularly so given the fact that such consumers would be (as plaintiffs were) nearly finished with their law school studies.[8] Because objectively and materially misleading conduct is a required element of a § 349 claim, plaintiffs' claim must therefore be dismissed.

III. PLAINTIFFS HAVE NOT PLED THAT THEY WERE MISLED, OR THAT THEIR INJURIES WERE CAUSED BY THE ALLEGED DECEPTION

Defendants also showed in their opening memorandum that the § 349 claim was fatally deficient in two other ways: (1) plaintiffs had not pled that they themselves were actually misled by any of the challenged statements (Defs.' Br. at 7); and (2) plaintiffs had not pled causation (id. at 19-20). Plaintiffs offer up only the most perfunctory response to the former deficiency, and no apparent response to the latter. Plaintiffs claim that in paragraph 38 of the complaint, they have sufficiently pled that they were actually misled (or "duped") by the BAR/BRI statements. (Opp. Br. at 16-17.) That paragraph states, however,

---

[8] Plaintiffs argue that defendants do not deny the allegations relating to the "barrage" of marketing (Opp. Br. at 10) – which later turns, miraculously, into an "admission" that they are true (Opp. Br. at 11). Of course, as this is a motion to dismiss, these allegations must be accepted as true; their actual truth or falsity is not at issue. What defendants pointed out, however, is that these marketing practices are not themselves alleged to be deceptive (Defs.' Br. at 8-9), a point not disputed by plaintiffs in their brief.

Additionally, plaintiffs' argument that their allegations of anticompetitive conduct state a claim under § 349 is without merit, as demonstrated in defendants' opening brief. (Defs.' Br. at 17-18.) Their ridiculous theory that defendants should have told people about their alleged monopolistic practices (even if it were true, which it is not) would, if accepted, transform every alleged wrongdoing, not "disclosed" by the defendant, into a GBL § 349 claim. Moreover, there are no facts in the complaint which remotely suggest that such a "disclosure" was necessary to render anything BAR/BRI said not misleading (i.e., BAR/BRI's advertising is about the value of its product, not its purported business practices), nor is there anything in the complaint making a plausible suggestion that this alleged "omission" would have been material to plaintiffs.

> In invoking the massive and continuous dissemination of written advertisements containing uniform fraudulent, false, deceptive and misleading statements set forth so as to a) dupe the Plaintiffs and the class defined below (as factually described heretofore herein) into paying an inflated price for BAR/BRI New York bar review products and b) dupe the Plaintiffs and the class into purchasing unnecessary bar review services . . . the Defendants have each violated Section 349 . . . .

(Am. Compl. ¶ 38.) This allegation appears much more fairly to be read as a claim that BAR/BRI made its advertising with the intent of "duping" plaintiffs ("so as to dupe" them); it is certainly a highly oblique means of stating that they have been misled, if that was the intent.

This is not, moreover, a matter of mere pleading technicalities. Defendants submit that there is good reason plaintiffs have not forthrightly pled that they were misled by BAR/BRI's advertising: it is surely not true. Each of the three plaintiffs is a graduate of a fine law school and a member of the bar of New York. (Opp. Br. at 1.) It is inconceivable that persons of such training were actually misled by statements such as "the bar exam is different from law school" (Compl. ¶ 28) – even if that statement were not self-evidently true. Admission that they were misled, however, is a necessary element of their claim. See Conboy, 241 F.3d at 258; Solomon v. Bell Atl. Corp., 9 A.D.3d 49, 52, 777 N.Y.S.2d 50 (1st Dep't 2004); @Wireless Enters., Inc. v. AI Consulting, LLC, No. 05-CV-6176, 2006 WL 3370696, at *12 (W.D.N.Y. Oct. 30, 2006) (dismissing § 349 claim based on allegedly false website statements where "there is no allegation that [plaintiff] was misled or otherwise injured as a result of" statements).[9]

Relatedly, as to causation, plaintiffs make no argument at all. It is not sufficient, as plaintiffs apparently believe, to plead deceptive acts and injury (Opp. Br. at 4); it is imperative that the plaintiff demonstrate that the deceptive acts caused the injury. Gale v. Int'l Bus. Machs.

[9] That this was not an oversight is seemingly confirmed by the fact that, with respect to their fraudulent inducement claim, plaintiffs unquestionably failed to plead that they relied upon the allegedly misleading statements – despite reliance being a necessary element of such a claim. Reliance, of course, necessarily implies that one has actually been misled, and thus it appears that plaintiffs are simply unwilling to plead that they were actually misled by the BAR/BRI advertising upon which they attempt to base their lawsuit.

Corp., 9 A.D.3d 446, 447, 781 N.Y.S.2d 45 (2d Dep't 2004); Goldych v. Eli Lilly & Co., No. 5:04-CV-1477, 2006 WL 2038436, at **6-8 (N.D.N.Y. July 19, 2006) (dismissing § 349 claim for failure to plead injury "by reason of" defendant's conduct).[10] Particularly given plaintiffs' failure to plead that they were themselves misled by any of the alleged deceptive acts, neither the complaint nor plaintiffs' opposition brief describes how BAR/BRI's advertising, even assuming it was deceptive, caused the injury complained of.[11]

IV. PLAINTIFFS' FRAUDULENT INDUCEMENT CLAIM ALSO FAILS

Finally, plaintiffs' claim of fraudulent inducement is, as previously demonstrated (Defs.' Br. at 20-22), woefully inadequate, and nothing in plaintiffs' opposition brief alters that conclusion in the slightest. First and foremost, the complaint fails to allege facts comprising essential elements of a fraud claim. Not only, as discussed with respect to GBL § 349, does the complaint fail to allege any misrepresentations, but the complaint unquestionably fails to plead that plaintiffs actually, and justifiably, relied on any alleged misrepresentations.

In addition, the claim fails to meet the heightened pleading standards of Rule 9(b). Plaintiffs fail to plead the most basic facts: what statements the plaintiffs heard and by whom they were made. They allege only that BAR/BRI made statements similar to what are now on its website to students at Albany Law School during the time plaintiffs were in attendance there – there is no allegation that, for instance, any of the plaintiffs attended a BAR/BRI presentation or even logged on to the BAR/BRI website to see any of these allegedly deceptive representations.

---

[10] Plaintiffs engage in a bit of deceptive omission themselves in their cite to Bildstein v. Mastercard Int'l, Inc., No. 03 Civ. 9826, 2005 WL 1324972 (S.D.N.Y. June 6, 2005) for the elements of a § 349 claim. (Opp. Br. at 4.) Plaintiffs conveniently truncate the last of the three elements, which states that the plaintiff must establish that he or she "has been injured as a result [of the deceptive acts]." Id. at *2 (emphasis added).

[11] Although plaintiffs state, correctly, that reliance is not a necessary element of a § 349 claim (Opp. Br. at 7), causation must still be alleged. Gale, 9 A.D.3d at 447. The two concepts are closely related. See, e.g., Restatement (Second) of Torts § 548A cmt. a ("Causation, in relation to losses incurred by reason of a misrepresentation, is a matter of the recipient's reliance in fact upon the misrepresentation in taking some action or in refraining from it."). But § 349's elimination of the reliance requirement does not thereby relieve a plaintiff of pleading causation. Plaintiffs here, having failed to plead that they relied upon BAR/BRI's advertisements in any way, have also failed to plead any other plausible theory of causation.

See In re WorldCom, Inc. Secs. Litig., No. 02 Civ. 3288, 2006 WL 557149, at *2 (S.D.N.Y. Mar. 7, 2006) (plaintiff's claim that misrepresentations were posted on website insufficient where no allegation of when plaintiff read or how relied upon); Bavaria Int'l Aircraft Leasing GmbH v. Clayton, Dubilier & Rice, Inc., No. 03 Civ. 0377, 2003 WL 21767739, at *5 n.8 (S.D.N.Y. July 30, 2003) (after-the-fact website printout did not support reliance absent allegations of when seen or how it was relied upon). Even if one could assume that plaintiffs heard some BAR/BRI advertising, there is absolutely no way from the complaint to divine which statements the plaintiffs heard; defendants simply cannot defend against a claim of fraud without even knowing what statements are alleged to be at issue. These vague "fraud in the air" allegations come nowhere near satisfying the specificity required by Rule 9(b).

CONCLUSION

For the foregoing reasons, the amended complaint in this action fails to state a claim upon which relief may be granted and should be dismissed in its entirety.[12]

Dated: New York, New York
October 15, 2007

SATTERLEE STEPHENS BURKE & BURKE LLP

By: /s/

James F. Rittinger
Bar Roll No. 507281
Attorneys for Defendants The Thomson Corporation and West Publishing Corporation
230 Park Avenue
New York, New York 10169
(212) 818-9200

[12] Plaintiffs have not sought leave to replead. Moreover, given the fundamental deficiencies in the complaint, leave to replead would be futile. See In re Am. Express Co. S'holder Litig., 39 F.3d 395, 402 (2d Cir. 1994) (district court not required to grant leave to replead sua sponte where not requested).